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IN THE COURT OF CRIMINAL APPEALS

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OF THE STATE OF TEXAS

Ijah Iwasey Baltimore, Appellant

v.

The State of Texas, Appellee

Appeal from McLennan County

* * * * *

STATE PROSECUTING ATTORNEY'S POST-SUBMISSION BRIEF AS AMICUS CURIAE

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

Ijah Iwasey Baltimore, Appellant

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STATE PROSECUTING ATTORNEY'S POST-SUBMISSION BRIEF AS AMICUS CURIAE[1]

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Rational jurors may assign probative value to conclusory statements of opinion even if the judges on a reviewing court would not.

STATEMENT OF THE CASE

Appellant was convicted of unlawful carrying of a handgun on premises licensed to sell alcoholic beverages, in this case a bar parking lot. TEX. PENAL CODE § 46.02(a), (c). The issue on review is how to define "premises" and whether the evidence satisfied whatever this Court determines that definition to be.

SUMMARY OF THE ARGUMENT

To the extent the evidence supporting the parking lot being part of the bar's premises is conclusory, that is irrelevant to sufficiency review.

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[1] This office received no fee for this filing.

ARGUMENT

At oral argument, a discussion was had regarding the probative value of a witness's conclusory statement that the parking lot where the unlawful carrying of a handgun took place was part of the bar's premises. This Court's recent opinion in *Curlee v. State*, PD-0624-20, __ S.W.3d __, 2021 WL 1397803 (Tex. Crim. App. Apr. 14, 2021), was mentioned. That case is worth revisiting in this case because the idea that a witness's definitive statement on a "fact . . . of consequence in determining the action," TEX. R. EVID. 401, should be afforded no probative value on review has been, and should remain, foreign to criminal law.

In *Curlee*, this Court explained why it would give no weight to a witness's opinion that the playground in question was open to the public:

> While a lay witness may provide an opinion, such an opinion must be rationally based on the witness's perception and helpful to clearly understanding the witness's testimony or to determining a fact in issue. TEX. R. EVID. 701. Absent the bases upon which Smejkal's opinion was formed, his opinion that the playground was open to the public was a factually unsupported inference or presumption. "[J]uries are not permitted to come to conclusions based on 'mere speculation or factually unsupported inferences or presumptions.'" *Braughton v. State*, 569 S.W.3d 592, 608 (Tex. Crim. App. 2018) (quoting *Hooper* [*v. State*], 214 S.W.3d [9,]15 [(Tex. Crim. App. 2007)]).

The first and third sentences are true but irrelevant. The second is itself a factually unsupported inference or presumption.

Rule 701 is irrelevant to sufficiency review. When Rule 701 says that a lay opinion must be "rationally based on the witness's perception" and helpful to the jury, it is setting the standard for admissibility. Once a lay opinion is admitted—properly or otherwise—the Rules of Evidence do not purport to dictate what value the fact-finder should assign it. Common sense dictates that a jury will assign less weight to an opinion that its holder does not explain, but that is not a rule of law. Just as a lay opinion's proponent runs the risk that a jury will disregard a conclusory statement, its opponent runs the risk that it will form part of the basis of conviction if left unchallenged.

The irrationality of verdicts based on speculation or unsupported inference is also irrelevant. That prohibition exists because rational jurors are presumed not to create evidence where none exists or can be logically deduced from other evidence. "[T]hey are not permitted to draw conclusions based on speculation." *Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). But that is not what happens when a juror chooses to believe someone who gives conclusory testimony. The jury does not have to theorize, speculate, or guess that the fact at issue exists. All it has to do is believe the person who flatly said it does. Making credibility determinations is the jury's job, and only the jury's job. TEX. CODE CRIM. PROC. arts. 36.13 ("the jury is the exclusive judge of the facts"), 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved, and of the weight to be given to the testimony, except . . . where

the law directs that a certain degree of weight is to be attached to a certain species of evidence."); *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010) (plurality) ("Viewing the evidence 'in the light most favorable to the verdict' under a legal-sufficiency standard means that the reviewing court is required to defer to the jury's credibility and weight determinations because the jury is the sole judge of the witnesses' credibility and the weight to be given their testimony.").

The problem with applying either of these two rules/doctrines to an unchallenged conclusory statement is that we cannot know whether it is rationally based on the witness's perception. That is why *Curlee*'s second sentence above is wrong. It could very well be that the witness has no basis for his lay opinion. It could very well be that he has a substantial basis for his opinion. We don't know because no one objected. As the proponent of evidence generally has no burden to demonstrate admissibility until a specific objection is made, *White v. State*, 549 S.W.3d 146, 152 (Tex. Crim. App. 2018), punishing the State in a sufficiency review for evidence that cannot even be shown to be inadmissible is two kinds of wrong. It may be unsatisfying to uphold a conviction when it is not obvious why the jury found a (perhaps necessary) conclusory statement credible. That discomfort has no place in a sufficiency analysis, where this Court has consistently required reviewing courts to consider even evidence it *knows* was admitted in error. *Curlee* recognized as much in another part of the same section containing the above excerpt. 2021 WL 1397803,

at *9 (quoting *Thomas v. State*, 753 S.W.2d 688, 695 (Tex. Crim. App. 1988), and citing *Moff v. State*, 131 S.W.3d 485, 489 (Tex. Crim. App. 2004)).

Moff is instructive. In it, this Court gave the example of a robbery proven exclusively through one witness whose testimony was rank hearsay. 131 S.W.3d at 489. The rationale for why that evidence must be considered is still true: the erroneous admission of inadmissible evidence may cause the State not to put on other evidence that would have been admissible; acquittal would unfairly deprive the State of one full opportunity to prove guilt. *Id*. at 490. That rationale applies with equal or greater force when the evidence is not challenged at all.

This case presents an opportunity to correct *Curlee*'s misstatement of law before it compounds itself. The State has argued that there is evidence of the perceptions underlying the lay opinions about the parking lot. It does not matter if there is. Those opinions are probative regardless. This Court should say so.

Finally, there are proper avenues for dealing with potentially unfounded lay opinions that form the basis for conviction. The usual course would be review of the objection made at trial, but none was made here. The next option is habeas review, which allows the gathering of new evidence to find out why no objection was made. Trial counsel may have had good reason not to challenge the multiple witnesses who said the parking lot was part of the bar's premises. If he did not, his performance may have been deficient for failing to investigate further. If it was deficient, it may not

have prejudiced his client because development of the post-conviction record might confirm the parking lot was part of the bar's premises. However it ends up, there is a process for that inquiry that does not require upending sufficiency law by requiring testimony that passes a *post hoc* gatekeeping test.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals affirm the judgment of the Court of Appeals.

Respectfully submitted,

/s/ John R. Messinger
JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 1,195 words.

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of May, 2021, a true and correct copy of the State's Post-Submission Brief as Amicus Curiae has been eFiled or e-mailed to the following:

Gabriel C. Price
McLennan County Criminal District Attorney
Appellate Division
219 North 6th Street, Suite 200
Waco, Texas 76701
gabe.price@co.mclennan.tx.us

Jessica S. Freud
FREUD LAW P.C.
100 N. Sixth Street, Ste. 902
Waco, Texas 76701
Jessi@FreudLaw.com

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

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Stacey Soule on behalf of John Messinger
Bar No. 24053705
information@spa.texas.gov
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Associated Case Party: Ijah Baltimore

Name	BarNumber	Email	TimestampSubmitted	Status
Jessica Freud		Jessi@FreudLaw.com	5/27/2021 10:43:17 AM	SENT
Gabriel C.Price		gabe.price@co.mclennan.tx.us	5/27/2021 10:43:17 AM	SENT

Associated Case Party: Barry Johnson

Name	BarNumber	Email	TimestampSubmitted	Status
Sterling Harmon		sterling.harmon@co.mclennan.tx.us	5/27/2021 10:43:17 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	5/27/2021 10:43:17 AM	SENT